

SUPREME COURT OF NIGERIA

15TH APRIL, 2005. SC. 49/1999

**CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, D. MUSDAPHER, I.
C. PATS-ACHOLONU, G. A. OGUNTADE, JJSC**

REYNOLDS CONSTRUCTION DEFENDANT/APPELLANT
CO. NIGERIA LTD.

AND

ROCKONOH PROPERTIES PLAINTIFF/RESPONDENT
COMPANY LTD.

PLEADINGS - Admission - Matters that are admitted - Are not in issue
between the parties (H1)

LANDLORD & TENANT - Mitigation - Tenants's covenant to repair -
Where breached - Remedy available to landlord - Was by a suit for dam-
ages - Not refusal of possession - Thereby making issue of mitigation to
arise (H2)

DAMAGES - Mitigation - Plea of - Has no one invariable manner - The
facts in dispute - May raise the issue (H3)

LANDLORD & TENANT - Mitigation - Surrender of demised property -
Refusal by landlord to take back possession - Justifies trial court's con-
sideration - Of the issue of mitigation of damages (H4)

DAMAGES - Mitigation - Court's attitude to oppressive claim for dam-
ages - Is to refuse the claim (H5)

APPEALS - Courts - Judgments - Overlooking underlying facts in dis-
pute - Made Court of Appeal reach a wrong decision (H6)

DAMAGES - Claim for - Is deemed to be in issue - Unless specifically
admitted by defendant - Defences such as mitigation - Should be pleaded
- Save where facts pleaded by plaintiff raised the defence (H7)

FACTS

The plaintiff/respondent filed an action against the defendant/appellant before the High Court Enugu. Defendant was a tenant occupying some buildings belonging to the plaintiff. There were three lease agreements covering 24 properties that were leased to the defendant, a foreign construction company. Plaintiff claimed inter alia, various amounts for arrears of rent, mesne profits, and enforcement of the repair clause contained in the tenancy agreement. Defendant initially raised a counter claim which was withdrawn in the course of the hearing. It was not disputed that the defendant paid its rent for up to 31st December, 1984, and that the parties agreed that the tenancy will come to an end on that date. Trouble arose when the defendant vacated the premises, sought to hand over the keys to the plaintiff who refused to take back possession on the ground that the defendant must first repair the properties as provided within the tenancy agreement.

The trial court felt that the plaintiff was wrong in refusing possession, looked at the issue of mitigation of damages incumbent on a plaintiff and dismissed the claim. On appeal to the Court of Appeal, it wrongfully construed the issue in dispute and found in the plaintiff's favour. Being dissatisfied, the defendant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the Court of Appeal was correct in law when it held that ‘mitigation’ was not pleaded by the appellant and that mitigation was the crucial reason for dismissing the plaintiff’s claim.

(2) If ‘mitigation’ was not pleaded by the appellant as the Court of Appeal held, did the respondent prove its case on a balance of probabilities as required by law?

(3) Having allowed the cross-appeal, was the Court of Appeal correct in law when it failed to consider its effect on the whole case?

HELD (Unanimously allowing the appeal per **OGUNTADE JSC**)

PLEADINGS - Admission

1. The defendant in its paragraphs 5,8 and 13 of the amended Statement

of Defence and counter-claim admitted the above paragraphs of plaintiff's amended Statement of Claim. It is an established principle of pleadings that there is no issue between the parties on a matter, which has been admitted by parties in their pleadings; and evidence will not generally be allowed on such fact, which has been admitted. See *India General Insurance Company Nigeria Ltd. v. Thawardes* (1978) 3 S.C. (p. 904 E)

Tenants's covenant to repair

2. Considering that the trial Judge had before coming to his conclusions in the passages above taken the position, which I accept as correct, that the remedy available to the landlord to enforce a tenant's covenants to repair was by a suit for damages; and having regard also to the finding that the defendant had attempted to surrender the demised properties but that the plaintiff had refused to accept the surrender on the ground that there were repairs not yet effected on the premises, it would be seen that the conclusion that the plaintiff should have mitigated his damages by accepting the surrender clearly arose from the case made by the parties on their pleadings. Indeed the issue of damages and the necessity for plaintiff to mitigate his loss was an integral part of plaintiff's cause of action.

If it was on the basis that the defendant had not repaired the properties in order to restore them to their pre-tenancy condition that the plaintiff refused to accept their surrender, surely, it was a legitimate deduction to be made by the trial Judge on the basis of simple common-sense that if the plaintiff had accepted the surrender when the defendant so offered, there would be no necessity for the plaintiff to treat the defendant as a tenant still in possession when it was clear that the defendant had no need any longer for the properties and when all the defendant had were only the keys which the plaintiff refused to accept. (p. 911 G)

DAMAGES - Mitigation - Plea of

3. It needs be said that there is not just one invariable manner of pleading mitigation of damages by a defendant. The facts raised by the parties on their pleadings may be such that the failure of the plaintiff to mitigate his loss is thereby put in issue. It is not necessary for a pleader to expressly

use the word ‘mitigation’ in his pleadings. It is sufficient if the facts in dispute themselves raise the issue of mitigation of damages. (p. 913 B)

Surrender of demised property

B 4. As I observed earlier the trial court had pointed out in his judgment the nature of the remedies ordinarily available to a landlord in plaintiff’s situation. Those remedies do not include a refusal to accept the surrender of a demised property. There was therefore a clear justification on the part of the trial Judge to consider the question whether the course of action C pursued by the plaintiff did not amount to a failure to mitigate the damages. It is settled law that a claim for special damages must be specifically pleaded.

D Similarly, a claim for special damages must be strictly proved. (p. 913 G)

Court’s attitude to oppressive claim for damages

5. A court of law would refuse to grant an unreasonable, exaggerated and E oppressive claim for damages. Therefore, it is an implicit consideration which would always guide a court in the grant of damages that such damages claimed or awarded are reasonable in the particular circumstances of a case. In *Osuji v. Isiocha* (1989) 6 S.C (Pt.II) 158; (1989) 3 F NWLR (Pt.111) 623 at 640, this court per Agbaje, JSC, observed:

G “*The law is that damages are deemed to be an issue whether special or general and whether the alleged damage is part of the cause of action or not. (See Wilby v. Elston 8 CB 142; Foucar v. Sinclair 33 LT R 318). So any allegation as to the amount of the damage is deemed to be traversed unless specifically admitted.*”

The learned author of Halsbury’s Laws of England, 4th Edition, Vol.1 2(1) at paragraph 1041 discusses the nature of a plaintiff’s duty to mitigate loss thus:

H “*The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant’s wrong and if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided. Where the plaintiff does mitigate his loss, he*

cannot recover damages in respect of that avoided loss even if the steps he took to avoid the loss are characterized as being more than what was reasonably necessary. The duty only arises upon the commission of a tort or breach of contract.” (p. 914 B)

B

Judgments - Overlooking underlying facts in dispute

6. The judgment of the court below was premised on the fact that the defendant did not raise in its pleadings any issue as to mitigation of damages. But I think the court below overlooked the underlying facts leading to the dispute between the parties. The facts pleaded clearly show how the dispute arose and those facts by themselves amply showed that the plaintiff did not take those options, which a prudent man would take to mitigate his loss. C

The judgment of the trial court is sound and meets the justice of the matter. The judgment of the court below in my humble view cannot be right in the circumstances. The said judgment would appear to have been based on an assumption that but for the fact that the trial Judge found that the plaintiff did not take steps to mitigate his loss, the damages claimed by the plaintiff would have been granted. Since the trial Judge rejected all the claims made by the plaintiff, the court below had the duty to consider each head of plaintiff's claims on its merit before granting each. D
(p. 915 B / 916 D) E

F

DAMAGES - Claim for - Is deemed to be in issue

7. From judicial authorities available, it can be correctly stated that the position of the law is that where a plaintiff alleges that he has suffered damage and claims for damages, the allegation and the damages claimed will be deemed to be in issue unless the defendant specifically admits them. A defendant who however wishes to contend that the damages claimed were too remote or that they were not the consequence of the default alleged or that the plaintiff did not take reasonable steps to mitigate his loss should plead the facts to sustain such defences unless the nature of the facts pleaded by the plaintiff by themselves raise these defences. G H

In the instant case, the facts pleaded by the plaintiff itself reveal that

rather than accept the surrender of its properties and sue later for damages on the cost of repairs, the plaintiff elected to adopt the option, which left its 24 buildings empty and unoccupied by a tenant for upwards of two years. This option taken by the plaintiff is rather startling in the light of the evidence given by P.W.1 that there were other persons who were willing to become tenants to the plaintiff in these buildings at the material time. (p. 915 G)

REPRESENTATION

Chief O. Ugolo, for the Appellant.

Mrs. A. J. Offiah SAN., (with her, Miss K. Belgore), for the Respondent.

CASES REFERRED TO

- B. E. O. O. v. Maduakoh (1975) 12 S.C. (Reprint) 68; (1975) 12 S.C. 91
Incar v. Benson (1975) 3 S.C. (Reprint) 81; (1975) 3 S.C. 117
India General Insurance Company Nigeria Ltd. v. Thawardes (1978) 3 S.C. 143
Chief Okparaoke v. Ephuonu & Ors. (1941) 7 WACA 53 at 55
Kosile v. Folarin (1989) 4 S.C. (Pt.1) 150; (1989) 3 NWLR (Pt.107) 1
Admiralty Commissioners v. SS Amerika (1917) AC 38
British Westinghouse Co. Ltd. v. Underground Electric Railways Ltd. (1912) AC 673
Payzu Ltd. v. Sauners (1919) 1 KB 581
Akpene v. Barclays Bank of Nig. Ltd. & Anor. (1986) 1 S.C. 47
Kate Ent. Ltd. v. Daewoo Nig. Ltd. (1986) 5 NWLR (Pt.5) 116

LEAD JUDGMENT BY OGUNTADE JSC

The dispute leading to this appeal arose from a landlord and tenant relationship. The respondent was the plaintiff at the Enugu High Court. It owned an estate consisting of several buildings in Enugu. It leased several of these buildings to the defendant, a foreign construction company. There were three lease agreements covering the 24 properties leased. The first agreement dated 1/11/79 covered 12 semi-detached buildings; the second dated 1/9/80 covered 6 semi-detached buildings and the third dated

1/3/80 covered six bungalow units. The estate is at Rockonor Estate, Ekulu west extension, G.R.A., Enugu. In respect of the buildings covered by the first agreement, the agreed rent was N102,000.00 per annum at N8,500.00 per unit. For the buildings covered by the second agreement, the agreed rent was N54,000.00 per annum at N9,000.00 per unit; and the rent for B the third set of buildings was N36,000.00 per annum at N6,000.00 per unit.

The plaintiff claimed against the defendant for:

“1. The sum of N369,000.00 (Three Hundred and Sixty-Nine Thousand Naira) being arrears of rent in respect of plaintiff’s houses C situate at Rockonoh Estate, Ekulu West Extension, G.R.A. Enugu, which were let to the defendant by the plaintiff under lease agreements, which arrears the defendant has refused and/or neglected to pay despite repeated demands; made up as follows:-

(a) From 1st March, 1984 to September, 1986 in respect of 6 D bungalows at the rate of N6,000.00 (Six Thousand Naira) per annum, per house i.e. N93,000.00 (Ninety-Three Thousand Naira);

(b) 1st November, 1984 to September, 1986 in respect of 12 semi-detached buildings at the rate of N8,500.00 (Eight Thousand, Five E Hundred Naira) per annum, per house -N204,000.00;

(c) 1st December, 1984 to 31st March, 1986 in respect of 6 semi-detached storey buildings at the rate of N9,000.00 (Nine Thousand Naira) F per annum, per house - N72,000.00.

2. Mesne profits at the rate of N138,000.00 (One Hundred and Thirty-Eight Thousand Naira) per annum from 1st October, 1986 until the defendant yields up possession thereof to the plaintiff;

3. An order of court against the defendant to comply with the G provisions of the tenancy agreement and the restoration of plaintiff’s house aforesaid to habitable and tenantable condition, until the defendant yields up possession thereof to the plaintiff;

4. Simple interest at the prevailing commercial rate of 13 per H centum on the N369,000.00 from the 1st day of March, 1984 until judgment.”

The parties filed and exchanged pleadings. The defendant initially raised a counter-claim. This was however, withdrawn in the course of the

hearing before the trial court. The case was heard by Edozie, J., (as he then was). On 31st May, 1990, the trial Judge in his judgment dismissed in their entirety the claims made by the plaintiff. The plaintiff was dissatisfied. It brought an appeal against the judgment before the Court of Appeal, Enugu Division. The defendant also brought a cross-appeal. The Court of Appeal Enugu (hereinafter referred to as the court below) in its judgment on 24/4/96 allowed the appeal and the cross-appeal. It concluded in these terms:

- “The judgment and orders of the lower court are hereby set aside. The appellant is therefore granted outstanding rents to the 1st October, 1986 in the sum of N369,000.00 with 13% interest per annum as claimed. Appellant is also awarded mesne profit in the sum of N360,000.00 in respect of the 18 houses that the respondent occupied from 1st October, 1986, to the date it vacated the houses.*
- D The appellant is awarded costs in the sum of N1000.00 only.”*

The defendant was dissatisfied with the judgment of the court below. It has brought this appeal against it. In the brief filed on behalf of the defendant (i.e. appellant’s brief), the issues for determination in the E appeal were identified as the following:

- “(1) Whether the Court of Appeal was correct in law when it held that ‘mitigation’ was not pleaded by the appellant and that mitigation was the crucial reason for dismissing the plaintiff’s claim.*
- F (2) If ‘mitigation’ was not pleaded by the appellant as the Court of Appeal held, did the respondent prove its case on a balance of probabilities as required by law?*
- (3) Having allowed the cross-appeal, was the Court of Appeal correct in law when it failed to consider its effect on the whole case?*
- G (4) Whether the respondent proved the amount of N369,000.00 arrears of rent awarded it by the Court of Appeal.*
- (5) Whether the Court of Appeal was correct in law when it awarded to the respondent the sum of N360,000.00 as mesne profits when it was not H proved before the trial court and the Court of Appeal.*
- (6) Whether the Court of Appeal was correct in law when it awarded interest at 13% per annum to the respondent on the N369,000.00 which it decided was the arrears of rent.”*

The respondent formulated five issues for determination. The said issues are however covered by the appellant's issues. It is not necessary therefore to set out the respondent's issues.

I intend to consider together all the issues for determination raised 5 by the appellant. I observed earlier that this dispute was between the plaintiff as the landlord and the defendant/appellant as the tenant. The plaintiff's claims which were reproduced earlier in this judgment postulated that the defendant was in arrears of rent for a total sum of N369,000.00 from 1/3/84 to September, 1986, 1/11/84 to September, 1986 and 1/12/84 to 31/3/86 in respect of the buildings covered respectively by each of the three tenancy agreements. If I may put it in another phraseology, the plaintiff was by this claim contending that a landlord and tenancy relationship existed between it and the defendant during the periods the arrears of rent stated above were incurred. D

The plaintiff's second claim for mesne profits also postulated that the three tenancies came to an end on 30/9/86 in respect of the first two sets of building and on 31/3/86 in respect of the third set of building.

The plaintiff in his Statement of Claim and evidence at the trial E admitted that the defendant before September, 1986, attempted to surrender possession of the buildings but that it (the plaintiff) did not accept the surrender because the defendant had not effected the repairs or renovation on the buildings as required by the tenancy agreements. On the other hand F the substance of the defendant's defence to plaintiff's claims was that it (the defendant) had complied with the terms of agreement by restoring the buildings to their pre-tenancy condition but that the plaintiff unreasonably refused to accept the surrender of the properties even after it was clear that the defendant was not physically in possession of the properties. The trial G court needed to determine the question of who was right between the parties. In other words, was there a landlord/tenant relationship between the plaintiff and the defendant between 1984 and 1986? Put another way, when could it be said that the defendant fully surrendered possession of H the properties?

Before I consider the approach of the trial court to a resolution of the germane issues, I should consider the pleadings of parties on an

important aspect. In paragraphs 3,5,6 and 8 of its amended Statement of Claim, the plaintiff pleaded:

“3. *The defendant has paid rental in respect of all the 24 houses in accordance with the agreements for the year 1984.*

B X X X X X X X X X X X

5. *By letter dated 14th August, 1984 Ref. 10A/2/Vol. 1/6/244, the defendant through their solicitors indicated their intention to surrender the buildings on or before the 20th day of September, 1984.*

C receipt of letter 10A/2/Vol. 1/6/244 dated August, 14,1984 and reminded the defendant of the provisions of the tenancy agreement which must be complied with before surrendering the houses.

D 8. *That on receipt of the report on the 18th October, 1984, the plaintiff on the 22nd day of November, 1984 directed a letter to the defendant that the tenancy agreement in respect of all the 24 houses will expire on the 31st of December, 1984 and suggested immediate work to effect necessary repairs as contained in the report before 31st of December, 1984.....”*

E (underlining mine)

The defendant in its paragraphs 5,8 and 13 of the amended Statement of Defence and counter-claim admitted the above paragraphs of plaintiff’s amended Statement of Claim. It is an established principle of pleadings that there is no issue between the parties on a matter, which has been admitted by parties in their pleadings; and evidence will not generally be allowed on such fact, which has been admitted. See India General Insurance Company Nigeria Ltd. v. Thawardes (1978) 3 S.C. 143, Chief Okparaoke v. Ephuonu & Ors. (1941) 7 WACA 53 at 55; and Pioneer Plastic Containers Ltd. v. Commissioner of Customs & Excise (1967) Ch 597. The result is that it was undisputed before the trial court that the defendant had at the commencement of the suit paid all its rents up to the 31st December, 1984. It was also not disputed that parties were agreed that the tenancy would come to an end on 31st December, 1984. Further, it was not disputed that the plaintiff did not accept the surrender of the properties from the

defendant as at 31/12/84. In other words, the defendant still had the keys to 18 of the 24 buildings as at 31st December, 1984. In resolving the question arising from the failure of the plaintiff to accept the surrender of the properties, on the ground that the defendant/appellant had breached the covenants to repair the properties, the trial Judge observed at page 114 of the record:

“It does therefore appear to me from the parties’ pleadings that it was common ground that the tenancies had come to an end by 31st December, 1984 and that all that remained was the yielding up of the possession of the premises which was the bone of contention, the issue being whether the houses had been properly redecorated, a condition, which according to the plaintiff, must be fulfilled before acceptance of possession. The learned Senior Advocate at page 2 paragraph 8 of his written address referred to part of paragraph 21 of the Amended Statement of Claim which reads thus: -

That the defendant had not surrendered possession of the remaining 18 houses still retains the same and their keys.’

‘And submitted that the defendant did not dispute that they are still holding the keys to the 18 houses and that they are in possession. The defendant explained the circumstances under which it still retains the keys to the houses. Even if the defendant is still in possession, a distinction has to be drawn between determination of a tenancy and the yielding up of possession of the houses comprised in the tenancy. A determination of a tenancy may occur without the possession of the houses being yielded up as where the tenant holds over. Therefore, the mere fact that the plaintiff has not taken possession of some of the houses does not necessarily imply that the tenancies had not determined. I am clearly of the view that from the parties’ pleadings, it was common ground that the tenancies had terminated on 31st December, 1984. It is my considered opinion that both parties having agreed that the tenancies determined on the 31st December, 1984, it was a misconception for the plaintiff’s counsel to argue that there was no notice to quit.....”

And at page 115 of the record, the trial Judge said:

“The remedies available to a landlord may depend to a large extent

on the provision of the particular tenancy. If it contains covenants of which the tenant is in breach, the landlord may sue on those covenants; if there are outstanding arrears of rent, he could sue; if the tenant holds over, he can sue for possession, and also claim damages or mesne profits for use and occupation for the period the tenants held over etc. See Halsbury's Laws of England, Simonds Edition page 587 Paragraph 1270, page 590 paragraph 1276, pages 704-708 paragraphs 1445 to 1450. See also Woodfall on Landlord and Tenant, *supra*, Chapter 20, pp.1041 to 1056."

Finally on the point, the trial Judge said at page 119 of the record:
 "Granting, but without holding, that the defendant was in breach of the covenant to repair and internally redecorate the demised premises at the determination of the tenancy, the plaintiff's remedy is an action in damages and not an order for specific performance: See Halsbury's Laws of England Vol.23 Simonds Edition page 587 Paragraph 1270 where it is stated thus: -

'Unless the lease contains a proviso empowering the landlord to re-enter for forfeiture in breach of the covenant to repair, the landlord's remedy is an action for damages; for specific performance of such a covenant will not ordinarily be granted.'

And in volume 36, page 267, paragraph 365 of the same book, the learned authors also stated as follows:-

The court does not enforce the performance of contracts which involve continuous acts and require the watching and supervision of the court. In particular the court does not as a rule order the specific performance of a contract to build or repair.'

By the force of the foregoing principle of law, it becomes clear that the plaintiff's claim for breach of covenant to repair being an order for specific performance and not a claim for damages is misconceived. Even if the claim were for damages, that would have been a claim for special damages which ought to be particularized and strictly proved: See *Obanor v. Obanor* (1976) 2 S.C. page 1, at pp. 3-5. In the case in hand, the pleadings and evidence are devoid of any particulars of special damages for breach of covenant of repair. In view of the foregoing, the plaintiff's

claim for an order for the restoration of the plaintiff's premises on a tenable condition fails and is accordingly dismissed."

In the passages reproduced above from the judgment of the trial Judge, it is manifest that the Judge took the position that it was not open to the plaintiff to refuse to accept the surrender of the properties it leased to the defendant/appellant on the ground that necessary repairs were not effected on them as provided in the agreement between the parties. The covenants which the plaintiff as the landlord claimed that the defendant did not keep read:

"Clause 2(4). To keep in tenable repair all the inside fixtures fittings and glass on the demised premises and not to remove from the demised premises any of the said furniture and effects but to keep the same in their present state of repair and condition (reasonable wear and tear excepted).

Clause 2(8) To internally redecorate the demised premises including all additions thereto at the determination of the term hereby created."

Assuming that the plaintiff was right in his assertion that the defendant/appellant had not complied with the two covenants above, what were the remedies available to the plaintiff? The learned author of Halsbury's Laws of England, 4th edition (reissue) Vol.27(1) at paragraph 368 page 346 writes:

"(1) The Landlord's Remedies
368. *In general, the Landlord's remedies for breach by the tenant of his repairing covenant are:*

- (1) forfeiture and/or*
- (2) an action for damages; or*
- (3) Entry to carry out the repairs and recovery of the cost of doing so if the terms of the lease so provide.*

Specific performance of a tenant's repairing covenant will not ordinarily be granted."

In the notes under the above statement of the law, the author H referring to Hill v. Barclay (1810) 16 Ves. 402 at 406 writes:

"This has long been stated by textbook writers to be the law but the jurisdiction to grant specific performance of contracts to do building

works has developed and there seems no reason in principle why such an order should not be made if the works are sufficiently defined (e.g. if a tenant is responsible for servicing a lift as in *Peninsular Maritime Ltd. v. Padseal Ltd.* (1981) 259 Estates 40 Gazette 860 EA) and the order is not being sought as a means of circumventing the statutory restrictions on the recovery of damages (see paras. 369-372 post). It may be that the remedy will often be inappropriate because damages will be a sufficient remedy; but this may not be so where the landlord has no right of entry and the property is deteriorating rapidly.”

In the instant case, parties were agreed that the tenancies were to come to an end on 31/12/84. The decision of the trial Judge was that the plaintiff should have accepted the surrender of the properties and later sued for damages for the repairs or renovation. In the appeal by the respondent (as appellant) before the court below, it was not part of its case that the trial court was wrong to hold that a suit for damages was the appropriate remedy available to the plaintiff. Rather the gravamen of the plaintiff’s complaint before the court below was that the trial court erred by refusing to grant its claim on the ground that the defendant did not plead the issue of mitigation of damages. The judgment of the trial court was set aside by the court below solely on the finding that the court of trial was wrong in relying on the issue of failure to mitigate damages which parties had not raised in their pleadings as a basis to deny the plaintiff the damages claimed.

The court below at pages 246-247 of the record in its judgment said:
“The learned trial Judge then went on to consider the evidence before the court that due to a compromise reached between the parties the respondent was persuaded to leave its furniture in the demised premises. On the effect of the furniture being in the premises beyond the date the tenancy was terminated, the learned trial Judge took the view that it was wholly due to the activities of Chief Onoh the Chairman and Managing Director of the appellant company. On this the learned trial Judge observed thus:-

‘He cannot by force prevent the defendant from removing its property then turn round to complain that he could not mitigate his loss because the defendant still had its furniture in the premises. It is therefore

my considered opinion that the plaintiff had acted unreasonably in not mitigating its loss granting that it is entitled to damages for the defendant's breach of the covenant to yield possession of the premises in repair.

It is thus clear from the above that the learned trial Judge was of the view that the appellant was entitled to damages for the respondent's breach of its covenant to yield possession of the premises in good repair. The appellant was however refused the award in damages because it had acted unreasonably in not mitigating its loss. As I have earlier set down the argument of counsel for the (sic) on this view of the case I do not intend to repeat same. Suffice it to say that the contention of learned counsel for the appellant is that the learned trial Judge was wrong to have imported 'mitigation' into his judgment to deny the appellant of its claim in damages. Whereas, the respondent's position is that the Judge was right, particularly having regard to the plea made in its pleadings in its Amended Statement of Defence regarding the excessiveness of, and frivolous, exaggerated, and unreasonable claim in damages made by the appellant." (Underlining mine)

The court below then came to the conclusion that as the defendant had not pleaded the question of mitigation of damages the trial court was wrong to have denied the plaintiff the damages it was entitled to.

I think, with respect to their Lordships of the court below, that they did not pay due regard to the reasoning of the trial Judge in arriving at the conclusion he reached on the claims for arrears of rent and mesne profit. In the manner the court below reasoned, it assumed that the trial Judge had found that the defendant was liable to the plaintiff on the claim for arrears of rent and that the only reason it did not make the award was because the plaintiff had not taken steps to mitigate its damages. The same reasoning actuated the approach of the court below to the award of mesne profit. But when the judgment is read as a whole, it is as clear as daylight that the trial Judge did not hold that the plaintiff was entitled to damages.

In the judgment of the trial court at pages 121 to 122 of the record, H the Judge after a consideration of the evidence called on the claim for arrears of rent said:

"If rents were outstanding for any period in 1984 one would have

expected the plaintiff to mention that fact in Exhibit 6. In his testimony, the plaintiff's sole witness, Chief Onoh, told the court that no rents were outstanding on the tenancies as at 17th August, 1984. Surely, if rents were being paid in advance, as it would appear, that of tenancy C commencing on 1st March would have been due. Assuming that rents would have fallen due on the respective anniversaries of the tenancies in 1985, there is no evidence that the plaintiff made any demand therefore in 1985. It was not until 14th March, 1986, as per Exhibit 8, that the plaintiff started claiming arrears of rent. When this fact was put to the plaintiff's sole witness under cross-examination, he explained that he started demanding 1984/85 rents as per Exhibit 13 but on realizing that Exhibit 13 was dated 12th February, 1986, he explained further that it was dated in error and that the correct date ought to have been 12th February, 1985. With respect, this explanation is hardly satisfactory because the rents demanded as per Exhibit 13 is for 1985 and not for 1984/85. The impression one gathers from Exhibit 13 is that rent was being calculated from January, 1985 to December, 1985 and this accords with the plaintiff's posture on the pleadings that the tenancies expired on 31st December, 1984 and that rental had been paid for the year 1984. In such a cancerous state of the pleadings and evidence, it is my humble view that no credible evidence has been led to show that rents were outstanding as at 31st December, 1984 to warrant the defendant being required to tender receipts for payment of rents for the period in question to support its denial on the pleadings and evidence that rents had been paid up to December, 1984. It is therefore my judgment that no rents were owed by the defendant as at 31st December, 1984 when the tenancies determined."

G (underlining mine)

And on the claim for mesne profits, the trial Judge said at pages 27-128 of the record:

H *"Be that as it may, it seems to me quite clear that the defendant from the 20th September, 1984 slated for surrendering the premises, as per Exhibit 5, had been ever willing to yield up to the plaintiff the possession of the houses. The plaintiff on the other hand was not willing to accept possession unless certain conditions were met. Subsequent correspondence*

exchanged between the parties. Exhibits 7 to 15, 17 to 20 bear eloquent testimony of this. In all those subsequent correspondence, the condition insisted on by the plaintiff was that the defendant must repair all the defects in the premises. I am fortified in this view by the fact that the plaintiff has claimed possession of the demised premises. Furthermore, in his evidence, the sole witness for the plaintiff testified that after this action was instituted, the defendant offered to him a cash sum of N100,000.00 to accept the surrender of the remaining premises but he refused and insisted on the necessary repairs being effected. Granting, but without so holding, that the defendant had failed to meet with this condition, would that entitle the plaintiff to claim rents or mesne profits since 20th September, 1984 when the defendant was ready and willing to give up possession? I think not. The plaintiff ought to have mitigated its damages by undertaking the repairs especially, as according to its letters. Exhibits 13 and 19, it had lots of tenants anxious to occupy the houses. The plaintiff is under a duty of taking all reasonable steps to mitigate the loss consequent on the defendant's breach and this debars it from claiming any part of the damages which is due to its neglect to take such steps: British Western House Electric Co. Ltd. v. Underground Electric Coys (1912) AC 673,689: See Chitty on Contract 23rd Edition Vol.1 pages 691 to 696. Mayne & McGregor on Damages 12th Edition pp. 131 -162. In the case of Tucker v. Linger (1882) 21 CR D 18. where a landlord in breach of a covenant failed to supply materials to the tenant with which to repair the premises, the tenant failed to recover for damage caused to his crops in the barn by bad weather because the barn was out of repair since he ought to have provided himself with the necessary material and done the repair, and charged the landlord with the price of the material."

Considering that the trial Judge had before coming to his conclusions in the passages above taken the position, which I accept as correct, that the remedy available to the landlord to enforce a tenant's covenants to repair was by a suit for damages; and having regard also to the finding that the defendant had attempted to surrender the demised properties but that the plaintiff had refused to accept the surrender on the ground that there were repairs not yet

effected on the premises, it would be seen that the conclusion that the plaintiff should have mitigated his damages by accepting the surrender clearly arose from the case made by the parties on their pleadings. Indeed the issue of damages and the necessity for plaintiff
B to mitigate his loss was an integral part of plaintiff's cause of action.

If it was on the basis that the defendant had not repaired the properties in order to restore them to their pre-tenancy condition that the plaintiff refused to accept their surrender, surely, it was a
C legitimate deduction to be made by the trial Judge on the basis of simple common-sense that if the plaintiff had accepted the surrender when the defendant so offered, there would be no necessity for the plaintiff to treat the defendant as a tenant still in possession when it was clear that the defendant had no need any longer for the
D properties and when all the defendant had were only the keys which the plaintiff refused to accept.

In arriving at its conclusion that the issue of mitigation of damages had not been raised by the defendant, the court below relied on the
E observation of this court per Nnaemeka-Agu, JSC, in *Kosile v. Folarin* (1989) 4 S.C. (Pt.1) 150; (1989) 3 NWLR (Pt.107) 1 at page 9 where he said:

*"It is true that a plaintiff has a duty not to increase the damages
F recoverable by him by his own voluntary and unnecessary act; See Admiralty Commissioners v. SS Amerika (1917) AC 38. It is also true that the law imposes on him a duty to do all in his power to minimize his loss. Otherwise anything which must be ascribed to his failure to do is not recoverable from the defendant; See British Westinghouse Co. Ltd. v.
G Underground Electric Railways Ltd. (1912) AC 673. But that duty is act reasonably: Payzu Ltd. v. Saumers (1919) 1 KB 581. As it is always a question of fact whether a person has acted reasonably or not, it is always necessary to raise the issue of the duty to mitigate and failure to discharge
H that duty on the pleadings so that the court of trial could go into it and thereafter express its opinion as to whether or not the plaintiff would, on the facts of the particular case, be adjudged to have reasonably breached that duty. This court has made it clear a number of times that before a point*

not raised in the courts below could be entertained in this court, it must be satisfied that it is a substantial point of law and that no evidence could have been given which, if it were raised in the court below, would have affected the decision. See Shonekan v. Smith (1964) 1 All NLR 16 at p. 1 103; Akpene v. Barclays Bank of Nig. Ltd. & Anor. (1986) 1 S.C. 47. B See also Kate Ent. Ltd. v. Daewoo Nig. Ltd. (1986) 5 NWLR (Pt.5) 116. Adegbaiye v. Loyinmi (1986) 5 NWLR (Pt.43) 655.”

It needs be said that there is not just one invariable manner of pleading mitigation of damages by a defendant. The facts raised by the parties on their pleadings may be such that the failure of the plaintiff to mitigate his loss is thereby put in issue. It is not necessary for a pleader to expressly use the word ‘mitigation’ in his pleadings. It is sufficient if the facts in dispute themselves raise the issue of mitigation of damages. C D

I get the impression that the court below was needlessly technical about a simple and straightforward matter. A close perusal of the case made by parties on their pleadings reveals that the dispute of the parties had boiled down to one crucial issue which was whether or not the plaintiff was right to refuse to accept the surrender of the demised properties for no other reason than that the defendant had not restored the properties to their pre-tenancy position. That issue clearly raises the question whether or not it was a reasonable course of action to adopt for a landlord to refuse to accept the keys of its demised properties being surrendered by a tenant and later for the same landlord to make a claim against the tenant not for the cost of repairs to the properties but for rents lost to the landlord over the period he refused to accept the surrender. E F

As I observed earlier the trial court had pointed out in his judgment the nature of the remedies ordinarily available to a landlord in plaintiff’s situation. Those remedies do not include a refusal to accept the surrender of a demised property. There was therefore a clear justification on the part of the trial Judge to consider the question whether the course of action pursued by the plaintiff did not amount to a failure to mitigate the damages. It is settled law that a claim for special damages must be specifically G H

pleaded. See **B. E. O. O. v. Maduakoh (1975) 12 S.C. (Reprint) 68; (1975) 12 S.C. 91 and Incar v. Benson (1975) 3 S.C. (Reprint) 81; (1975) 3 S.C. 117.**

Similarly, a claim for special damages must be strictly proved:

B See **Shell B. P. v. Cole (1978); (1978) 3 S.C. (Reprint) 128; 3 S.C. 183; W.A.E.C v. Koroye (1977) 2 S.C. (Reprint) 24; (1977) 2 S.C. 45 and Agunwa v. Onukwe (1962) 1 All NLR 537.**

C **A court of law would refuse to grant an unreasonable, exaggerated and oppressive claim for damages. Therefore, it is an implicit consideration which would always guide a court in the grant of damages that such damages claimed or awarded are reasonable in the particular circumstances of a case. In Osuji v. Isiocha (1989) 6 S.C (Pt.II) 158; (1989) 3 NWLR (Pt.111) 623 at 640, this court per**
D **Agbaje, JSC, observed:**

“The law is that damages are deemed to be an issue whether special or general and whether the alleged damage is part of the cause of action or not. (See Wilby v. Elston 8 CB 142; Foucar v. Sinclair 33
E *LT R 318). So any allegation as to the amount of the damage is deemed to be traversed unless specifically admitted.”*

The learned author of Halsbury’s Laws of England, 4th Edition, Vol.1 2(1) at paragraph 1041 discusses the nature of a
F plaintiff’s duty to mitigate loss thus:

“The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant’s wrong and if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided. Where the plaintiff does mitigate his
G *loss, he cannot recover damages in respect of that avoided loss even if the steps he took to avoid the loss are characterized as being more than what was reasonably necessary. The duty only arises upon the commission of a tort or breach of contract.”*

H And as to the standard of conduct required of the plaintiff, the same author writes at paragraph 1042 page 457:

“The plaintiff is required only to act reasonably and whether he has done so is a question of fact in the circumstances of each particular case

and not a question of law. He must act not only in his own interests but also in the interests of the defendant and keep down the damages so far as it is reasonable and proper, by acting reasonably in the matter. One test of reasonableness is whether a prudent man would have acted in the same way if the original wrongful act had arisen through his own default"

The judgment of the court below was premised on the fact that the defendant did not raise in its pleadings any issue as to mitigation of damages. But I think the court below overlooked the underlying facts leading to the dispute between the parties. The facts pleaded clearly show how the dispute arose and those facts by themselves amply showed that the plaintiff did not take those options, which a prudent man would take to mitigate his loss.

In Atkins Court Forms, 2nd edition (1985) Vol.32, the learned authors write:

"Any allegation that a party has suffered damage or as to the amount of damages is deemed to be traversed unless specifically admitted. In general therefore, no denial of damage is necessary. This applies whether the damage is general or special even where the alleged damage is not part of the cause of action.

Nevertheless, the prevailing and better practice is for the defendant to deal specifically with the claim for damages though not the amount. The reason is that the plaintiff will know more clearly the case he has to meet and will not be taken by surprise. It is therefore, common practice for the defendant not only to traverse the claim for damages whether general or special and whether aggravated or exemplary, but also to raise as positive allegations such defences on the question of damages as to their causation, their foreseeability and their remoteness and the failure of the plaintiff to take reasonable steps to mitigate his loss, stating the particular, relative for this purpose."

From judicial authorities available, it can be correctly stated that the position of the law is that where a plaintiff alleges that he has suffered damage and claims for damages, the allegation and the damages claimed will be deemed to be in issue unless the defendant specifically admits them. A defendant who however wishes to

contend that the damages claimed were too remote or that they were not the consequence of the default alleged or that the plaintiff did not take reasonable steps to mitigate his loss should plead the facts to sustain such defences unless the nature of the facts pleaded by the plaintiff by themselves raise these defences.

In the instant case, the facts pleaded by the plaintiff itself reveal that rather than accept the surrender of its properties and sue later for damages on the cost of repairs, the plaintiff elected to adopt the option, which left its 24 buildings empty and unoccupied by a tenant for upwards of two years. This option taken by the plaintiff is rather startling in the light of the evidence given by P.W.1 that there were other persons who were willing to become tenants to the plaintiff in these buildings at the material time.

The judgment of the trial court is sound and meets the justice of the matter. The judgment of the court below in my humble view cannot be right in the circumstances. The said judgment would appear to have been based on an assumption that but for the fact that the trial Judge found that the plaintiff did not take steps to mitigate his loss, the damages claimed by the plaintiff would have been granted. Since the trial Judge rejected all the claims made by the plaintiff, the court below had the duty to consider each head of plaintiff's claims on its merit before granting each. This is plaintiff's claim for arrears of rent and the claim for mesne profit. The trial Judge had elected to treat them as the same.

The respondent's counsel under issue one engaged herself in criticizing at length the reasoning and conclusion of the trial Judge in his judgment. This approach overlooks the fact that since the court below had not in its judgment undertaken a general consideration of the case on its merits but had rather hinged its judgment on the issue of the failure of the defendant to plead mitigation of damages claimed, this court, confined as it were only to the issues formulated for determination could not go on a roaming mission to discover where the trial Judge might have been wrong in his judgment other than as necessitated by the issues raised.

In the final result, this appeal is meritorious. The appeal is allowed.

The judgment of the court below given on 24th April, 1996 is set aside. In its place, the judgment of the trial court dismissing plaintiff's claims is restored. The defendant/appellant is entitled to costs against the plaintiff in this court and the court below. The costs are assessed at N10,000.00 and N5,000.00 respectively.

B

KUTIGIJSC

I read in advance the judgment just rendered by my learned brother, Oguntade, JSC. He has adequately covered all the relevant issues necessary for the determination of this appeal. I agree with his reasoning and conclusions. The Court of Appeal was clearly in error when without first ascertaining whether or not the defendant was liable at all, it proceeded to set aside the judgment of the trial High Court and awarded damages to the plaintiff. I will therefore allow the appeal, set aside the judgment of the Court of Appeal and restore that of the trial High Court dismissing plaintiff/respondent's claims in their entirety.

I endorse the order for costs.

E

KATSINA-ALUJSC

I have had the advantage of reading in draft the judgment of my learned brother, Oguntade, JSC. I agree with it. The conduct of the respondent in this matter is highly repulsive. The respondent did all it could to exploit the appellant who appeared helpless in the circumstances. For example, the appellant paid rent to the respondent for the years that it was no longer in physical occupation of the rented premises because the respondent held it to ransom by refusing to accept the keys. The obligation of the appellant was to deliver up the premises at the end of the tenancy agreement in a state of repair. This, it did but at every turn the respondent would hatch-up some obligation on the part of the appellant totally unconnected with the terms of the lease agreement.

In the circumstances, I too, would allow the appeal. I abide by the consequential order made by my learned brother, Oguntade, JSC.

MUSDAPHERJSC

I have had the honour to have read in advance the judgment of my Lord, Oguntade, JSC., just delivered with which I entirely agree. I am of the view that the plaintiff was not entitled to refuse to accept the surrender of its properties it leased to the defendant/appellant merely on the grounds that necessary repairs were not effected on the various properties as provided in the lease between the parties.

Assuming that the plaintiff was right that the defendant was bound to comply with the two covenants in clause 2(4) and clause 2(8) of the lease, the remedies open to the plaintiff as the landlord for breach by a tenant of covenant to repair are:- (a) forfeiture, (b) an action for damages or (c) entry to carry out the repairs and recovery for the cost of the repairs carried out. It is manifest from all the facts of this case that the plaintiff is duty bound to mitigate his losses. The plaintiff has himself to blame for keeping the 24 buildings empty and unoccupied by tenants for a period of over two years. It is for the above and the fuller reasons contained in the aforesaid judgment, that I too allow this appeal. The judgment of the court below given on the 24th day of April, 1996 is set aside. In its place, the judgment of the trial court dismissing the plaintiff's claims is restored. I abide by the order for costs proposed in the aforesaid leading judgment.

PATS-ACHOLONUJSC

I have read the judgment of my learned and noble brother, Oguntade, JSC., in draft and I agree with him. A careful analysis of the case before us shows unmistakably that the attitude of the respondent in this matter traduced all known concepts and practices attendant to the landlord and tenant contracts. In particular, the manner the respondent set out to ignore the terms of the agreement between the parties in respect to (a) the date the tenancy would come to an end (b) the question of repairs of any damage or ensuring that the houses were put in a tenable condition, shows that the respondent had ignored the real terms and had

striven to foist a new contract or even tried to ungainly exploit the appellant by trying to hold it at ransom.

The reason the relationship between the parties deteriorated was the inordinate desire of the respondent to stretch the covenant to effect repairs undertaken by the appellant, to a ridiculous extreme. B

In paragraph 350 Vol.27(1), 4th Edition of Halsbury Laws of England, the learned authors relying on numerous decided cases throughout the ages write thus:

“Covenant construed with reference to original condition of premises. Every covenant to repair must be construed primarily according to the words used (1) *Lurcott v. Wakely and Wheeler* (1911) 1 KB 905 at 915 *Austruther - Gough - Calthorpe v. Oscar* (1924) 1 KB 715, but having regard to the age and nature of the premises at the commencement of the lease (2) *Brew Bros Ltd. v. Snax (Ross Ltd.)* (1970) 1 QB 618. In that case, however, of a covenant by the tenant for general repair, such as a covenant to repair the demised premises and to yield them up in good and substantial repair and condition (3) *Stanley v. Towgood* (1836) 3 Bing NC 4, or to keep and leave them in good and tenantable order and repair (4) *Lister v. Lane and Nesham* (1893) 2 QB 212, or as often as occasion requires well and substantially to repair, uphold and keep them, and the same so well and substantially repaired, upheld and kept to yield up at the end of the term (5) *Lurcott v. Wakely and Wheeler* (1911) 1 KB 905, the particular form of words used is immaterial so long as it plainly expresses the intention that the premises are to be repaired, kept in repair and yielded up in repair (6) *Ravenseff Properties Ltd. v. Daustone (Holding) Ltd.* (1980) QB 12. In each case the obligation upon the tenant is to keep and deliver up the premises he has taken in a state of repair proper for such premises (7) *Lurcott v. Wakely and Wheeler* (1911) 1 KB 905; and the tenant may, therefore, be liable to put the premises into a better condition than they were in at the time of the letting. F G

Where the premises were old at the time of the demise, the tenant must keep and deliver them up in a fit state of repair as old premises. He is under no duty under his covenant to bring the premises up to date (9) *Lurcott v. Wakely and Wheeler* (1911) 1 KB 905; but the fact that the H

premises happen to be old in no way relieves him from the burden of his covenant. If, in order to comply with his covenant, it is necessary that he should replace part after part until the whole is replaced, he is obliged to do so (10) Lurcott v. Wakely and Wheeler (Supra); but, provided that he keeps the premises in a habitable condition, he is not responsible for such deterioration as the premises may suffer as a result of the natural operation of the elements and the passage of time (11) (Supra).”

It is inequitable for the respondent who not contented by the contents of the tenancy agreement which stipulated when the contract would come to an end, used all manner of subterfuge to oist on the appellant damages by way of mesne profits, long after the expiration of the lease agreement, on the premise that the appellant company had been in breach. In my view, it is unconscionable to attempt to prolong the contract which had long ceased to exist to merely extract extra money from the appellant. No court would allow itself to be used for unconscionable and skewed exploitation. I too would allow the appeal, as I believe it has no merit.

E

F

G

H